The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. MARK ASHMORE, Defendant.	NO. CR09-0402RAJ UNITED STATES' SENTENCING MEMORANDUM

A. Introduction

The United States of America, by and through Jenny A. Durkan, United States Attorney for the Western District of Washington, and Nicholas W. Brown and Aravind Swamination, Assistant United States Attorneys for said District, submits this sentencing memorandum. Sentencing in this matter is scheduled for April 1, 2011.

On November 24, 2009, the grand jury for the Western District of Washington returned a four-count Indictment against the Defendant, Mark Ashmore, charging him and three others with Conspiracy to Commit Wire fraud in violation of Title 18, U.S.C. Sections 1349 and 1, and three counts of Wire Fraud, in violation of Title 18, U.S.C., Section 1343.

On September 13, 2010, a jury-trial began before your honor. On September 20,

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2010, the Defendant was found guilty of each count.

Each of the offenses of which the Defendant was convicted carries a maximum penalty of: imprisonment for up to thirty (30) years; fine of up to two hundred and fifty thousand dollars ($250,000.00); a period of supervision following release from prison of up to three (3) years; and a one hundred dollar ($100.00) special assessment. For the reasons set forth below, the government respectfully recommends the Court sentence the Defendant to 96 months in custody, to be followed by three years of supervised release.

B. The Offense Conduct

This Court presided over a week long trial of Mr. Ashmore, during which the conspiracy, and the various roles of the three co-conspirators, were gone into in some depth. The government presented the testimony of each of the charged co-conspirators, multiple straw buyers involved in the scheme, multiple witnesses from victim lender institutions, and law enforcement officers involved in the investigation. The government also presented numerous types of documentary evidence, including loan documents and financial records.

The scheme was a classic "credit investor" scam that used the personal and financial information of others to fraudulently gain control of various properties. Mr. Ashmore would identify residential real property for sale. He would then contact the seller of the subject properties, and would generally offer to purchase the property at well above the asking price. As part of the proposed sale agreement, the seller of the subject properties would sign an "upgrade agreement," assigning any proceeds over the original asking price to a company owned or controlled by Mr. Ashmore.

Mr. Ashmore and his co-conspirators would recruit and pay individuals to pose as buyers ("straw buyers") for the subject properties, often promising to pay them substantial sums of money. In return for their fee, the straw buyers would allow their identities and credit information to be used in mortgage loan applications. The applications were submitted to financial institutions and mortgage lenders, and represented the straw buyer as the true buyer of the selected properties, and the individual responsible for the loan.

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The money obtained via the fraudulent loans was the diverted to Mr. Ashmore and then on to the other conspirators, and some was used to secure residential real property for Defendant's and other members of the conspiracy's use.

Beginning sometime in 1999 or 2000, the Defendant, Mark ASHMORE, became involved in real estate investing, buying and selling residential properties in the greater Western Washington area. From this time until approximately January 2008, the Defendant used several business entities to conduct his fraudulent business, including Equity Solutions Northwest (ESNW), Remarkable Properties LLC, Ashmore Capital Corporation and Quan Holdings.

This fraudulent scheme was orchestrated to purchase dozens of residential properties in Washington and Nevada. A majority of the properties were later "flipped" in subsequent transactions, often leading to falsely inflated property values. This means that members of the conspiracy would recruit another straw buyer to purchase the same real property, typically at a significantly inflated price over the prior purchase agreement between a member of the conspiracy and the original seller.

The conspirators would also often make, or cause others to make, the payments on the mortgage loans obtained as part of the conspiracy, in an attempt to maintain the loans until the properties could be sold again, oftentimes in another flip to a subsequent straw buyer. However, in the end, the conspirators ultimately failed to make payments on the loans, and the properties generally went into foreclosure or were sold in short sales, causing the financial institutions and mortgage lenders to suffer substantial losses. The scheme also caused incredible damage to the finances and credit of dozens of individuals recruited to participate in the conspirators' schemes.

C. <u>Base Offense Level and Loss Amount Calculations</u>

The Presentence Report accurately summarizes the offense conduct in this case and correctly calculates the offense level, criminal history category, and resulting advisory Sentencing Guidelines range. The Defendant's base offense level is 7, pursuant to U.S.S.G. § 2B1.1.

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A 20-level upward adjustment based on loss amount also applies, pursuant to U.S.S.G. § 2B1.1(b)(1)(J), as the loss amount is greater than $7,000,000, but less than $20,000,000.

For purposes of the guidelines calculation, the government calculates the total loss associated with the Defendant's fraudulent scheme at over $10 million dollars (approximately $10,193,472.00). To arrive at this figure, a Financial Analyst at the FBI and the case agent, SA Hilary Salee, took the gross loan amounts for the various properties involved in the scheme and examined the recorded documents pertaining to the subsequent sales of these properties. However, the gross amount must be reduced by "the amount the victim has recovered at the time of the sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing." Application Note 3(E)(ii). In addition, for the purposes of the Guidelines calculation, the loss amount is the greater of the actual or intended loss, whichever is higher. Application Note 3(C).

D. Defense Objections to Loss Calculation

Defense counsel submitted various objections to the government's loss calculations to the U.S. Probation Officer. First, the Defendant argues that the methodology used to calculate the losses is incorrect. Second, the Defendant argues that there is a lack of nexus between the Defendant and some of the various properties and transactions. He further argues that he cannot be held responsible for losses attributable to the scheme as a whole, but in which he had no direct involvement. Lastly, the Defendant argues that the loss amounts must be reduced because of the broader decline in real estate values over the last several years.

i. The Proper Methodology was used to Calculate Real and Estimated Losses

The primary objection to the government's methodology made by the Defendant appears to be two-fold; first, that transactions subsequent to the Defendant's personal involvement should not be considered and second, that all losses were affected by the

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overall decline in the real-estate market and not attributable to the Defendant. However, both such factors were the "reasonably foreseeable" consequences of the Defendant's offense. Subsequent sales were not only foreseeable in most circumstances, but often part of the pattern common to the conspiracy. For example, with respect to the property located on 24th Street in Bellevue, Washington, the Defendant cites the 2003 purchase of the property by the Rule Agency from the prior owner, as an intervening factor that caused a loss not attributable to the Defendant. However, the Rule Agency was a real estate entity operated by a friend and cohort of the Defendant, Steve Kish. In fact, as the Court may recall, a number of transactions related to this scheme were completed by the Rule Agency, because the Defendant often referred straw buyers to Mr. Kish when payments were not being paid on the underlying loans. The Defendant's objection to the losses influenced by the "overall loss in real property value" is discussed below.

ii. The Defendant is Responsible for the Results of all Jointly Undertaken Criminal Activity.

The Defendant also objects to being held responsible for losses attributable to others involved in the conspiracy, on the theory that he was only personally involved in some of the fraudulent loans. This is plainly incorrect. Sentencing Guidelines Section 1B1.3 provides that conduct relevant to sentencing in cases of "jointly undertaken criminal activity" - such as a criminal plan or scheme, whether or not charged as a conspiracy - includes "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." While a district court may not automatically hold a defendant responsible for the losses attributable to the entire conspiracy, the defendant is responsible for losses resulting from conduct that is both reasonably foreseeable and within the scope of his agreement. *United States v. Treadwell*, 593 F.3d 990, 1002-1003 (9th Cir. 2010). For example, in *United States v. Partow*, the defendant was convicted of bank and wire fraud arising from his participation in a scheme to fraudulently obtain real property loans. The defendant argued that the district court should not have considered losses on two properties not included in his counts of

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conviction. 283 Fed. Appx. 476 (9th Cir. 2008). The court rejected his argument and affirmed the district court's calculation because the record reflected that those properties were within the scheme in question. *Id.* at 478. The same general principles apply to restitution. *United States v. Lawrence*, 189 F.3d 838, 846 (9th Cir. 1999) (affirming an order of restitution of $574,700 for a fraud scheme, even though only $60,411 were "directly attributable" to the acts for which the jury found defendant guilty).

The Defense specifically objects to the inclusion of loss figures relating to four properties in Pahrump, Nevada. However, these properties were clearly part of the same scheme. Each of the properties involve fraudulent loan documents, completed in exactly the same manner as the other transactions that were part of the conspiracy. Each of the properties involve the use of straw buyers, including two purchases by Luke Abernathy and his wife. As the Court may recall, Mr. Abernathy testified at trial about being introduced to the scheme by co-defendant Luke Reimer and discussing the real estate investment plan with the Defendant. Mr. Abernathy testified specifically that it appeared that the Defendant was in charge of the real estate operation. The other two properties in Nevada involved straw buyers recruited by Mr. Reimer, who also testified at trial about recruiting his family members to participate in the scheme. These transactions were clearly reasonably foreseeable by the Defendant, even if he was not specifically involved.

iii. The Decline in the Larger Real Estate Market is Irrelevant.

The Defendant repeatedly objects to the loss calculations of the government for failing to account for the "overall loss in real property value" in the larger market. However, loss calculations for sentencing purposes should not be reduced for this reason. A number of courts in the Ninth and other circuits have refused to do so. *See, e.g., United States v. Davoudi*, 172 F.3d 1130, 1135 (9th Cir. 1999) (noting that because collateral property is valued at time of sentencing, even if "the bank suffers losses after the offense is discovered because of a falling market or even through its own improvident management, those consequential losses can be attributed to the defendant's conduct for

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purposes of Guidelines sentencing"); *United States v. O'Neill* 190 Fed. Appx. 577, 579 (9th Cir. 2006) (*citing United States v. Sarno*, 73 F.3d 1470, 1500-01 (9th Cir. 1995)) (finding that the "government's actual loss calculation was reasonable even though it included the effects of an unexpected market downturn"); *see also United States v Goss*, 549 F.3d 1013, 1019 (5th Cir. 2008) (finding that loss calculation should be based on fair market value of collateral at the time of the initial sentencing, market fluctuations notwithstanding). Moreover, your honor addressed the same question more recently in *U.S. v. Anderson, et. al*, CR08-212RAJ. In *Anderson*, defense counsel raised the same objection and the Court determined that an overall decline in the market should not be factored in the loss calculations.

The rationale the court outlines in *United States v. Mallory* may explain why courts have refused to account for even unforeseeable shifts in market conditions. 2010 U.S. Dist. LEXIS 62904 (E.D. Va. June 23, 2010). The court explains how the application notes require that the Sentencing Guidelines only require that actual loss, which in a mortgage fraud case is the entire unpaid value of the loan principal be "reasonably foreseeable." *Id.* "Credits Against Loss," however, are a distinct step in the loss calculation in the Application Notes, which do not require that the value of the collateral be reasonably foreseeable. *Id.* Thus, the court rejected defendant's argument that he could not have foreseen that defrauded banks would recover so little from foreclosure sales, because "loss may be reduced only by the amount actually recovered or by the amount that is recoverable at the time of sentencing, whether or not the defendant had any idea what the collateral's value would be by that time." *Id.*

But even if the value of collateral must be foreseeable, some courts have found that the crash in the housing market was a foreseeable consequence of defendant's fraudulent schemes. *See United States v. Parish*, 565 F.3d 528, 535 (8th Cir. Minn. 2009) (rejecting argument that loss would not have been as high if not for downturn in economy in general and housing market in particular, finding that defendants "reasonably could foresee" the impact of their mortgage fraud scheme on local housing prices); *Mallory*,

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2010 U.S. Dist. LEXIS 62904 (noting that the "deterioration in the housing market was in no small part due to mortgage fraud schemes such as that perpetrated by defendant and his coconspirators").

Nor should falling real estate prices result in a reduction in the loss calculation for the purposes of restitution. Credit for returned collateral in the restitution context is generally valued at the time of foreclosure, and courts have rejected arguments that the collateral should be valued at an earlier date. *See, e.g., United States v. Gossi*, 608 F.3d 574 (9th Cir. 2010). Unlike in the sentencing, moreover, losses need not be reasonably foreseeable, as restitution "seeks to compensate the victim for all the direct and proximate losses resulting form the defendant's conduct." *Gossi,* 608 F.3d 574 (rejecting defendant's argument that losses must be foreseeable). And outside forces affecting the value of loss do not constitute an "intervening cause" if the defendant's conduct caused the loss itself. *United States v. Gordon*, 393 F.3d 1044, 1055 (9th Cir. 2004). In *Gordon*, for example, the defendant alleged that the stock he embezzled was fraudulently inflated because of the actions of a third party, making the loss calculation for his restitution order higher than the loss amount for which he was responsible. *Id.* at 1055. The court rejected the argument that the alleged fraudulent stock inflation was an "intervening cause" because "it did not 'cause' the loss to [the victim], but merely adversely affected the value of the property that Gordon embezzled." *Id.*

E. Total Offense Level and Advisory Guidelines Range

The U.S. Probation Office correctly calculates the base offense level for the Defendant's offenses at level seven (7), pursuant to USSG 2B1.1(a)(1). The Probation Office also correctly adds an upward adjustment of twenty (20) levels for the total loss amount, pursuant to USSG § 2B1.1(b)(K), for a loss amount more than $7,000,000, but less than $20,000,000. Next, the presentence report correctly accounts for an upward adjustment for the number of victims of this offense. While only three specific victim lenders were presented at trial, the government has identified well over ten victims of the conspiracy, which does not include the numerous individuals who were victimized by the

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Defendant's conduct in this case. A two-level increase is therefore appropriate pursuant to USSG § 2B1.1(b)(2)(A).

The Defendant is also properly identified as the leader and organizer of the offense. The evidence presented at trial clearly established that the Defendant was the driving force behind this conspiracy. He recruited others to join in his scheme, including co-defendants Luke Reimer and Hiep Ngyuen, and was far more involved in the execution of the offense than his co-defendants. The Defendant was further responsible for recruiting multiple straw buyers, including two who testified at trial, Robin Myers and Nino Mallamo, as he repeatedly sold blatantly false dreams of quick and easy profits to dozens and dozens of people. Countless individuals have had their financial lives destroyed by the Defendant and it is clear that the scheme was organized and executed primarily by the Defendant. The Defendant was also the founder of ESNW, the primary vehicle used to execute the scheme, and profited substantially from its success. A two-point role enhancement pursuant to USSG § 3B1.3(c) is therefore appropriate.

The Total Offense Level is therefore a level 31. To date the Defendant has never accepted responsibility for his offenses and no reduction for acceptance is appropriate. The government agrees with the presentence report that the defendant has no prior criminal history and is therefore in a criminal history category of I. The corresponding guideline range is 108-135 months.

F. Restitution

Pursuant to 18 U.S.C. 3663A and 3664(f)(1)(A), the Court must order that the Defendant pay full restitution to the victims of his offenses. The government calculates the total restitution owed by the Defendant to be $1,545,930.00. The government's position on restitution in this matter is more thoroughly addressed in Docket No. 125.

G. Recommendation and Justification.

The government respectfully recommends a custodial sentence of 96 months, to be followed by five years of supervised release.

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As set forth in the Supreme Court's decision in *United States v. Booker*, 453 U.S. 220, 246 (2005), this Court is required to consider the sentencing range calculated under the United States Sentencing Guidelines, together with the other factors set forth in Title 18, United States Code, Section 3553(a), including: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed (a) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, (b) to afford adequate deterrence to criminal conduct, (c) to protect the public from further crimes of the defendant, and (d) to provide the defendant with educational and vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentences and the sentencing range established for the offense as set forth in the guidelines; (5) any pertinent policy statement; (6) the need to avoid unwarranted sentence disparity among defendants involved in similar conduct who have similar records; (7) the need to provide restitution to victims.

The government's recommended sentence reflects the leading role the Defendant played in this wide ranging and serious conspiracy, the tremendous financial damages to both financial institutions and private individuals caused by the Defendant's conduct, and his continued failure to take responsibility for committing these crimes.

As discussed above, it is clear from the evidence introduced at trial that the Defendant was the primary actor behind this scheme. He recruited his co-conspirators, multiple straw buyers, and was far more involved than any other participant. This scheme would not have existed without the Defendant's strong leadership role. Moreover, the offenses committed by the Defendant were incredibly serious crimes. The impact of this credit investor scheme on the mortgage lending industry cannot be overstated. Many of the lenders involved in this particular scheme have gone out of business. This includes Pierce Commercial Bank in Tacoma, Washington, which was closed by state regulators on November 5, 2010. There is also untold damage to the multitude of people the Defendant took advantage of curing the course of the scheme. While some of the people

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he recruited to participate had some idea of fraudulent nature of the scheme, many were purely duped by the Defendant's savvy recruitment efforts.

Lastly, the Defendant has continued to deny responsibility for the crimes he committed. Despite the overwhelming evidence and the jury's clear verdict, the Defendant has steadfastly maintained his innocence. His failure to acknowledge wrongdoing is incredibly troubling to the government and further justifies the recommended sentence. The Defendant clearly needs a sentence that will provide adequate deterrence from criminal conduct, and the public needs to be protected from his scams.

H. Conclusion

For the reasons set forth above, the government respectfully recommends a sentence of 96 months, to be followed by three years of supervised release.

DATED this 25th day of March, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorney of record for the defendant.

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